

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

To be argued by
MILTON WEINBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-6087

ARTHUR C. LOGAN MEMORIAL HOSPITAL,

Plaintiff-Appellee,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, HUGH L. CAREY, as Governor of the State of New York, JOSEPH A. CALIFANO, Secretary of the U.S. Department of Health, Education and Welfare, ABRAHAM D. BEAME, as Mayor of the City of New York, HARRISON J. GOLDIN, Comptroller of the City of New York, and DONALD KUMMERFELD, as Director of the Budget of the City of New York, and as pro tem Administrator of the Health and Hospitals Corporation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT

APPELLANTS' REPLY BRIEF

MILTON WEINBERG,
STEVEN GOLDENBERG,
GEORGE SAWAYA,
Of Counsel.

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Defendants-
Appellants Beame, Goldin,
Kummerfeld and the Board of
Directors of the New York
City Health and Hospitals
Corporation
Municipal Building
New York, N.Y. 10007
566-4506

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(1)

Appellee mistakenly urges that the issue is "Does the plaintiff's complaint establish Federal jurisdiction in the instant action." (Br. p. 6).

Our appeal is based upon the failure of the complaint to state a claim upon which relief can be granted. It is evident that subject matter jurisdiction does not exist with respect to certain of the claims asserted (applts' br. p. 16). However, since appellee's complaint alleges in vague, conclusory terms that city officials

have by their actions violated various provisions of the United States Constitution and the Medicaid Act, appellants had also urged the District Court to dismiss the complaint for failure to state a claim upon which relief can be granted (56a, Transcript 83). The distinction between subject matter jurisdiction and insufficiency of a complaint is set forth in Hagans v. Lavine, 415 U.S. 528, 542-543 (1974).*

Appellee urges that a valid claim exists against the City officials because the City and State acting "alone and in concert" fail to reimburse the plaintiff for proper medicaid monies under the terms of the Medicaid Act or the State Plan. On this appeal, for the first time, appellee now argues that an interpretation of Sec. 1396a (2) of the Medicaid Act is required to assure that a lack of adequate funds from local sources will not result in lowering the amount, scope, duration or quality of care and services available under the plan (br. p. 7). We fail to see the relevancy of this required provision of a State Plan as the basis for a federal claim against the City.

The "arbitrary recoupment" by the City is said

*Neither the motion to dismiss nor the transcript are included in the Joint Appendix since the District Court in denying the motion from the bench also declined to give appellants leave to appeal. Appellee did not request these papers to be included in the Joint Appendix. See letters of June 23, 1977 and June 27, 1977 concerning the proposed record which were transmitted to appellee's counsel and which are annexed as Addendum A.

to interfere with Logan Hospital's cash flow. However, it is clear that the City has in no way abdicated its responsibility to pay for its share of the Medicaid cost, but has simply decided, in view of the tremendous sums of money that had previously been over-advanced to many hospitals, it would recoup, not only from appellee but from other voluntary hospitals, a portion of these monies (51a). Nothing in the law prevents the City from exercising its common law right to recoup part of the funds it had already advanced to appellee in anticipation of Logan Hospital rendering services to Medicaid patients.

The action of the City in recouping a portion of the over-advances is not an attempt to surcharge the hospital, after audit of its books, for Medicaid funds improperly received, but simply one to reduce the amount of Logan's indebtedness after a long period of generous advancements of City tax levy funds in anticipation of Medicaid billings by the hospital.

Nor does appellee possess a federally protected right to entitle it under these circumstances to a due process hearing before the City makes such recoupment.

(Compare Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

(3)

Appellee's reliance on the opinion of Judge

Owen in the Park East Hospital case is also misplaced (Br: p. 10). In that case, the Court ruled that the State's actions to close the hospital violated due process of law, as required by the National Health Planning and Development Act. (See Appellee's brief-Addendum 1, p. 23). Appellee now urges that the complaint and the affidavit, in support of the application for a preliminary injunction, contain averments that the City's action are part of a design to eliminate 5,000 hospital beds. This statement should be disregarded since neither the complaint nor the affidavit contains those averments. Moreover, the complaint does not contain any allegation that this action is brought pursuant to the National Health Planning Act (42 U.S.C. 300k, et seq.), the statute on which Judge Owen ruled against the State in the Park East Hospital case.

Neither The City of New York nor the New York City Health and Hospitals Corporation, unlike the State, has any powers whatsoever with respect to the licensing or revocation of a license of a voluntary non-profit hospital such as Arthur C. Logan Memorial Hospital. Nor can any legislative intent be found in the National Health Planning Act to show that Congress intended by that Act or the Medicaid Act to guarantee all hospitals they may continue to operate despite their inability to remain solvent. See Briarcliff Haven, Inc. v. Department of HUM. RES., GA., 403 F. Supp. 1355, 1363 (Dist. Ct., N.D. Ga., 1975).

(4)

The argument that a valid claim exists against City officials by virtue of a mandamus claim against the Secretary of the U.S. Department of Health, Education, and Welfare, is obviously without merit (Br. p. 15). Moreover, by memorandum and order dated August 24, 1977, the District Court granted the motion of the Secretary to dismiss the complaint. For the information of the Court, a copy of the memorandum and order is annexed hereto as Addendum B. It should also be noted that the Attorney General of the State of New York has also moved for an order granting judgment on the pleadings to defendants Toia and Whalen.

September 9, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Defendants-
Appellants, Beame, Goldin,
Kummerfeld and the Board
of Directors of the New
York City Health and Hospitals
Corporation.

MILTON WEINBERG,
STEVEN GOLDENBERG,
GEORGE SAWAYA,
of Counsel.

June 23, 1977

M. Douglas Haywoode, Esq.
500 Fifth Avenue
New York, N.Y. 10036

Re: Arthur D. Logan Memorial
Hospital v. Toia, et al.

Dear Sir:

The following is a list of those documents which we have chosen to include in our appendix on appeal:

1. Summons and Complaint
2. Order to Show Cause for Preliminary Injunction and T.R.O. and papers annexed.
3. Affidavits of George Kalkines and Milton Weinberg in opposition to Preliminary Injunction and papers annexed - April 11, 1977
4. Affidavits of Milton Weinberg and George Kalkines In Opposition to Motion for Preliminary Injunction - April 20, 1977
5. Memorandum and Order of Owen, J.
6. Preliminary Injunction and Order of Owen, J.
7. Notice of Appeal

Please contact me as soon as possible regarding any additional documents which you may feel should be included in the appendix on appeal.

Yours truly,

W. BERNARD RICHLAND
Corporation Counsel

By EDWARD TUOZZO
(Rm. 1558, Tel. 566-4511)

ADDENDUM A



LAW DEPARTMENT
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007

W. BERNARD RICHLAND,
Corporation Counsel

June 27, 1977

M. Douglas Haywoode, Esq.
500 5th Avenue
New York, N. Y. 10036

Re: Arthur D. Logan
Memorial Hospital v.
Torcia, et al

Dear Sir:

This is to confirm our phone conversation of this date approving the appendix on appeal with the documents enumerated in my letter of June 23, with the addition of the transcript from the proceedings held on April 14 and April 21.

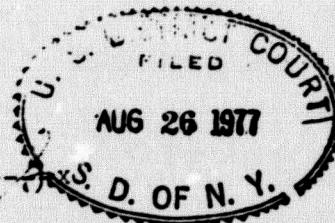
Thank you for your cooperation in perfecting this appeal.

Yours truly,

W. BERNARD RICHLAND
Corporation Counsel

By:
Edward Tuozzo
(Rm. 1558, Tel. 566-4511)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



ARTHUR C. LOGAN MEMORIAL HOSPITAL, :

Plaintiff, :

77 Civ. 1216

-against- :

MEMORANDUM AND ORDER

PHILIP L. TOIA, as Commissioner of :
Social Services of the State of New :
York, et al., :

Defendants. :

-X

OWEN, District Judge

Defendant Joseph Califano, Secretary of the United States Department of Health, Education and Welfare (the Secretary), has moved to dismiss pursuant to Rule 12(b)(1), FRCP, or in the alternative, for summary judgment. Since the relief sought against (or from) the Secretary either exceeds his statutory authority or is discretionary, this motion is granted.

Under Title XIX of the Social Security Act (Medicaid) 42 U.S.C. §§ 1396 et seq., HEW reviews and approves State Plans, and insures that States are operating in conformity with their approved plans. Plaintiff, in its complaint, alleges that New York City and New York State are wrongfully withholding Medicaid reimbursement monies, and therefore New York State is out of compliance

ADDENDUM B

MICROFILM

AUG 27 1977

with its approved plan.⁽¹⁾

Under the Medicaid statute, it is within the discretion of the Secretary to hold a compliance hearing pursuant to 42 U.S.C. § 1396c. The ordering of such a hearing is not within the mandamus power of this Court. Leonard v. Mitchell, 473 F.2d 709 (2d Cir. 1973).⁽²⁾

If, after a compliance hearing,⁽³⁾ the Secretary determines that a State is out of compliance, he may again within his discretion, withhold part or all payment under

(1)

Plaintiff also makes general allegations concerning alleged inequities on the State's and City's parts in determining Medicaid reimbursement rates. No allegations against the Secretary are made with respect to the rates. This issue is presently before another judge of this Court, Hospital Association of New York State, Inc. v. Toia, 76 Civ. 2027. Logan Hospital is a member of the plaintiff Hospital Association; the Secretary is a defendant in that suit. Since all issues that plaintiff has raised are being addressed in that class action, there is no need to concurrently litigate those issues here. Rosenfeld v. Schwitzer Corp., 251 F.Supp. 758, 763 (S.D.N.Y. 1966).

(2)

Pursuant to 45 C.F.R. § 213.15, an institution or affected individual may petition to appear as a party at this compliance hearing.

(3)

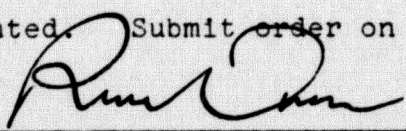
While plaintiff has made no request for a compliance hearing, upon receipt of this complaint, the HEW has commenced an inquiry to determine whether a compliance hearing is warranted. In effect, plaintiff has now received all the relief to which he is entitled from the Secretary.

Medicaid. That is his only statutory remedy. HEW can also enter into negotiations with a State it believes is out of compliance, 45 C.R.F. § 213.1(b). The Secretary can withhold payment or he can negotiate with a State. He cannot compel compliance.

In any case, plaintiff's real complaint is against the City and State. A trial on the issue, inter alia, of the alleged wrongful withholding of Medicaid money will be held this fall. Since the contract for the services of Logan Hospital under Medicaid was between the Hospital and the City and State, it is not necessary that the Secretary be a party to this action. Montana Deaconess Hosp. v. Department of Social Services, 538 P.2d 1021 (Mont. 1975).⁽⁴⁾

For the foregoing reasons, defendant Califano's motion to dismiss is granted. Submit order on notice.

August 24, 1977.


United States District Judge

⁽⁴⁾

The Secretary's inquiry into New York State's alleged non-compliance can obviously proceed concurrently with this case. While there will be common issues, the ultimate purposes are different.

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

IVAN BADILLObeing duly sworn, says, that on the 9 day of SEPT., 1977

at No. 500 - 5th Ave. in the Borough of MANH. in The City of New York, he served three copies
 of the annexed APPLT'S REPLY BRIEF upon M. DOUGLAS HAYWOOD Esq.,
 the attorney for the PLTX - APPL'EE in the within entitled action by delivering
 three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and
 leaving the same with him.

Sworn to before me, this 9day of SEPT., 1977 }Ivan BadilloBruce S. Garner

BRUCE S. GARNER
 Commissioner of Deeds
 City of New York - No. 41786
 Commission Expires May 1, 1978